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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-645, Abbott v. Abbott. Ms. Howe.

ORAL ARGUMENT OF AMY HOWE
ON BEHALF OF THE PETITIONER

MS. HOWE: Mr. Chief Justice, and may it please the Court:

The Hague Convention exists to ensure that custody disputes are resolved by the courts of the country of habitual residence rather than through abduction. It thus generally requires the return of a child who is abducted in violation of a right of custody. So too, a ne exeat right permits a parent to require that the child reside in the country of habitual residence, thereby rendering international abduction illegal.

Ne exeat rights are not only rights of custody under the text of the convention, but they also track the convention's vital purpose of ensuring that children are not subject to international abduction.

Under the convention, Mrs. Abbott cannot evade the jurisdiction of the Chilean courts by abducting the child to Texas and then asking a Texas

1 State court to nullify the rights granted to Mr. Abbott
2 under Chilean law. That is the sound view of a great
3 majority of signatory courts to consider the issue as
4 well as essential authorities in both the United States
5 and Chile.

6 JUSTICE GINSBURG: You have an absolutely
7 sound ground if this were a convention on the mutual
8 recognition of jurisdiction and judgment, but it's not.
9 You -- you said the whole question is deferring to the
10 courts of habitual residence, but this statute is not
11 raised in terms of court jurisdiction. It's in terms of
12 the rights of a custodial parent.

13 MS. HOWE: Yes, Justice Ginsburg, and
14 Mr. Abbott has a statutory ne exeat right as well. The
15 fact that he also has this right under the order is
16 irrelevant, we believe, because no one is arguing for --
17 that -- the question is whether or not he has rights of
18 custody under Chilean law, and it is Chilean law that
19 confers the ne exeat right.

20 The fact that he also has this right under
21 the order is -- is irrelevant for this case. If Mrs. --

22 JUSTICE GINSBURG: You are not relying on
23 the order; you are just relying on the statute?

24 MS. HOWE: We are relying just on the
25 statute.

1 JUSTICE BREYER: If that's so, imagine a
2 well-educated American woman, marries a man from a
3 foreign country X, they have a divorce. The judge says,
4 the man is completely at fault here, a real bother. The
5 woman is 100 percent entitled to every possible bit of
6 custody and the man can see the child twice a year on
7 Christmas Day at 4:00 in the morning, that's it.

8 Now, there's a law like Chile's that says,
9 you can't take the child out of the country without the
10 permission of the father too, this person who gets to
11 see the child twice a year. And you are saying that
12 that's custody. That's custody and -- and what is the
13 woman supposed to do?

14 She can't get a decent job worthy of her
15 education. The -- the -- all the courts said that she's
16 entitled to the child. She has to choose between her
17 life and her child. And -- and is that what this --
18 this convention is aimed at?

19 MS. HOWE: It would be a right of custody,
20 Justice Breyer. But the convention doesn't look to the
21 purpose. All it looks --

22 JUSTICE BREYER: Now -- now, of course, what
23 I'm asking you with my example --

24 MS. HOWE: Yes.

25 JUSTICE BREYER: Is why interpret it that

1 way, where all that you have is a rule of law that
2 applies to everybody, even in the case I've tried to
3 imagine, where to say it's a right of custody would ruin
4 the life of the woman, would give the husband something
5 which he should -- certainly shouldn't have in any moral
6 term, it would seem, and she comes back to the United
7 States and is forced to give her child back to whatever
8 this country is. I have called it X. Now, why give
9 that kind of interpretation to this statute, which seems
10 to have the purpose of looking after women and children?

11 MS. HOWE: Certainly. The statute that you
12 hypothesized in this case, Justice Breyer, reflects the
13 domestic country's judgment that the child should remain
14 in the country, unless the father agrees to its
15 departure. We don't look to why the child's -- why
16 the --

17 JUSTICE BREYER: Well, that's your
18 conclusion. I'm just trying to get -- to see if there
19 is any humane purpose underlying the interpretation that
20 you have advocated, and certainly there are two
21 interpretations here. Your opponents will soon present
22 us with a different one.

23 MS. HOWE: But, I mean --

24 JUSTICE SOTOMAYOR: There is an alternative,
25 isn't there?

1 MS. HOWE: There is an alternative. I mean,
2 certainly under Chilean --

3 JUSTICE SOTOMAYOR: For the woman to go to
4 the Chilean court?

5 MS. HOWE: Exactly, Justice Sotomayor.
6 Under Chilean law and presumably under the law that
7 you've hypothesized as well, Justice Breyer, the woman
8 could go to court and ask for permission to leave the
9 country, and that's precisely what Mrs. Abbott could
10 have done in this case. She just never opted to do
11 that.

12 JUSTICE BREYER: That is my question. I'm
13 trying to get at what the humane purpose would be, given
14 your interpretation of the law in this kind of
15 situation?

16 MS. HOWE: Well, the right to determine
17 whether your child will remain in the country or go to
18 another country is a very important right, and it's
19 simply that that's the -- if that's the law that the --
20 that the country has decided to establish, the
21 convention doesn't look to why that is.

22 And the drafters expressly envisioned,
23 Justice Breyer, that there would be cases in which one
24 parent would have physical custody of the child, the
25 other parent would simply have the right to determine

1 the child's place of residence.

2 JUSTICE KENNEDY: But what if -- what if you
3 have a country in which ne exeat orders are routinely
4 imposed in every custody case? Then it's almost like
5 your statutory case here. What does that have to do
6 with custody?

7 MS. HOWE: Well, that, again, simply
8 reflects that country's judgment.

9 JUSTICE KENNEDY: It seems -- excuse me, but
10 I'll just finish my own question.

11 MS. HOWE: Yes.

12 JUSTICE KENNEDY: It seems to me that what
13 you are saying is that, in some countries, there --
14 there is a presumption that there is always custody in
15 the party -- in both parties.

16 MS. HOWE: There may be a presumption. We
17 have researched and we don't believe that that is
18 actually particularly common, Justice Breyer. But
19 certainly in many countries there is now a presumption
20 of joint custody.

21 And so, in all of those cases, under the
22 convention, the left-behind parent would be entitled to
23 the child's return. And the convention, again, doesn't
24 look to the purpose. It doesn't look to -- there's
25 nothing in the convention, certainly, that requires that

1 there be one category of parents who have rights of
2 custody and are entitled to the return and another
3 category of parents who are not entitled to the return
4 remedy. There's a -- there's a system of mutual trust
5 under the convention and --

6 JUSTICE GINSBURG: What happens to the woman
7 who, now she has abducted the child to Texas, and she
8 says to the Texas court: If you send me back, I am
9 going to be beaten by this man who has a history of
10 being a batterer?

11 MS. HOWE: Two things, please,
12 Justice Ginsburg. The first is that that could happen
13 in any case, not simply a case involving a ne exeat
14 right, but also a case in which the left-behind parent
15 had joint custody, and so to a -- the second is that the
16 convention --

17 JUSTICE GINSBURG: You are saying that the
18 court -- the court that asked to give it back to the
19 convention is helpless, that it's automatic that if
20 there is a custody right the court in the State to which
21 the child has been taken must order that the child be
22 returned?

23 MS. HOWE: No -- no, Justice Ginsburg.
24 Article 13(b) of the convention provides an affirmative
25 defense to -- to return if the court in the country of

1 refuge determines that the child would face either a
2 grave risk of physical or psychological harm or
3 otherwise face an intolerable situation.

4 JUSTICE KENNEDY: As long as you brought
5 that up, I was just going to ask. Should -- if you
6 prevail in this case, should there be a remand to see if
7 that section applies?

8 MS. HOWE: Article 13(b) has not previously
9 been raised in this case, but in any event, regardless,
10 if this Court were to rule in our favor, then the
11 appropriate course would be to remand for resolution of
12 any remaining issues, yes, Justice Kennedy.

13 CHIEF JUSTICE ROBERTS: The answer you just
14 gave about concern for the protection of the child, that
15 applies only to the child? In other words, in the case
16 that we have been discussing, if the woman would be
17 subject to whatever persecution or domestic violence,
18 but the child -- you know, there is no suggestion of any
19 harm targeted to the child, that would not be a case in
20 which they could grant refuge?

21 MS. HOWE: The -- the statute does -- the
22 text does apply to the grave risk of physical or
23 psychological harm to the child, and certainly --

24 CHIEF JUSTICE ROBERTS: To only -- only to
25 the child?

1 MS. HOWE: Only to the child, although
2 arguably there would be some risk of psychological harm
3 if what the woman's allegation --

4 JUSTICE GINSBURG: Do you know --

5 CHIEF JUSTICE ROBERTS: So the woman would
6 be subject to -- if she wanted to remain with the child,
7 there would be no protection. She would have to choose
8 between subjecting herself to violence or being apart
9 from the child?

10 MS. HOWE: Well, the courts could also, of
11 course, Chief Justice Roberts, try, you know, to solve
12 the problem through undertakings and placing conditions
13 on the child's return, if the -- if the article 13(b)
14 were not fully able to address the court's concerns, so
15 the --

16 CHIEF JUSTICE ROBERTS: That would be
17 consistent with the convention, for the returning State
18 to say, we are returning the child, but only if -- you
19 know, bang, bang, bang?

20 MS. HOWE: Well, in other contexts, for
21 example in the context of visas, yes. The special
22 commission meetings, when this issue has come up, has
23 specifically urged the court -- or urged courts to
24 consider undertakings and also to consider
25 intergovernmental negotiations in an attempt to ensure

1 both the mother and the child's safe return, yes.

2 JUSTICE BREYER: What is the law -- what is
3 the law if a mother and a child -- sorry. What is the
4 law if a couple living in a foreign country has a decree
5 of the court and the decree of the court grants certain
6 visiting rights to the father, and the father, violating
7 those rights, takes the child to a different country.
8 Can the mother get it back?

9 MS. HOWE: I'm sorry? Could you --

10 JUSTICE BREYER: What is the normal law
11 where you have a couple, they are supposed to leave the
12 child in the country, but it doesn't say that, there is
13 no ne exeat thing, they have just agreed to certain
14 visiting rights.

15 MS. HOWE: Yes.

16 JUSTICE BREYER: And in violation of those
17 rights, the father, say, takes the child to another
18 country, in violation of the divorce decree of the first
19 country.

20 MS. HOWE: If the mother had rights of
21 custody, then those rights of custody would be breached
22 by the --

23 JUSTICE BREYER: No, you are not
24 understanding my question.

25 MS. HOWE: Okay. I apologize, Justice

1 Breyer.

2 JUSTICE BREYER: My question is, outside
3 this convention --

4 MS. HOWE: Yes.

5 JUSTICE BREYER: If -- forget the
6 convention. Suppose it is just a divorce decree.

7 MS. HOWE: Yes.

8 JUSTICE BREYER: And suppose a parent,
9 violating the decree, takes the child to another country
10 in violation of an ordinary divorce decree. Does the
11 injured parent have a way of getting the child back?

12 MS. HOWE: There is no international --
13 other international remedy. In the United States, for
14 example --

15 JUSTICE BREYER: I'm sure there isn't, but
16 under the law --

17 MS. HOWE: -- there could be, for example,
18 the UCCJEA in the United States. You could go to court
19 with an international order and attempt to seek the
20 child's return in that manner, yes. You would attempt
21 to seek enforcement of the court's order in that --

22 JUSTICE BREYER: You would go and take the
23 court's order to a court in the United States and try to
24 enforce it?

25 MS. HOWE: Yes.

1 JUSTICE BREYER: And the American court
2 would be under obligation, I guess, to enforce it?

3 MS. HOWE: In theory, yes. Yes.

4 JUSTICE BREYER: Well, all right. So our
5 question here is which of the two mechanisms should we
6 use?

7 MS. HOWE: We should use this convention,
8 Justice Breyer --

9 JUSTICE BREYER: I know you think that, but
10 I'm still worried about my mother in the case that --
11 that you gave me.

12 MS. HOWE: One thing that -- that may give
13 you some comfort, as far as the convention's drafters
14 are concerned, is that this was a scenario that the
15 convention's drafters had in mind from the very
16 beginning of the drafting process. They had five
17 scenarios that they --

18 JUSTICE BREYER: I have read through that,
19 and I will tell you that, on the basis of my reading
20 through all that stuff, my mind is in equipoise. I find
21 some one way, some the other.

22 I think maybe each side does a little
23 overstating here, but -- but I -- I am in equipoise,
24 having looked at that quickly. So I know -- I know the
25 stuff, you can -- but that's why I am trying to get to

1 the underlying humane idea that is supposed to underline
2 that, and see if it applies here.

3 MS. HOWE: Okay. The -- the convention was
4 drafted on the premise that the best interests of
5 children are served by their return to the country of
6 habitual residence, so that the courts in that country
7 can make the decisions. The convention --

8 JUSTICE GINSBURG: Ms. Howe, wasn't the --
9 the problem that gave rise to this Abduction Convention
10 just the situation that Justice Breyer brought up? That
11 is, the parent that has visitation rights, snatches the
12 child, takes it to that parent's home country, and then
13 you are relying on only the court order. That's why we
14 have the Hague Convention on the Abduction of Children.

15 It wasn't for the -- I mean, this -- this
16 case is not the usual case. The usual case is the
17 noncustodial parent takes the child out of the country
18 where the custodial parent lives, and internationally,
19 there was a huge problem of getting the child back and
20 that's why we have the Hague Convention on Abduction,
21 because courts weren't enforcing foreign court orders.

22 MS. HOWE: That's right. They were -- they
23 were not enforcing foreign court orders, and it's true,
24 Justice Ginsburg, as you say, that the prototypical case
25 that was present when they drafted the convention was

1 that one parent, usually the mother, would have sole
2 physical custody and the father would have just
3 visitation, and it was intended to address that problem.

4 But at the time that they drafted the
5 convention, they also had in mind the increasing
6 prevalence of joint custody and included that in the
7 convention. And they also recognized, as I said, that
8 there would be scenarios in which one parent would have
9 what we would consider to be physical custody of the
10 child; the other parent would have other rights, such as
11 the right to determine the child's place of residence.
12 And they did intend for the parent who did not have
13 physical custody but had other important rights relating
14 to the child, such as the right to determine the child's
15 place of residence --

16 JUSTICE GINSBURG: Well, what is the -- what
17 is the significance of their breaking down the two
18 categories? One is the rights of custody and the other
19 is rights of access.

20 I take it that under your view of the
21 Chilean law, given that the noncustodial parent will
22 always have this right to block taking the child out of
23 the country, then there's really no difference between
24 the two categories, because every, say, father with the
25 right of access -- not custody, just access -- would

1 automatically by virtue by the law of Chile have this
2 one custodial right; that is, to block taking the child
3 out of the country.

4 MS. HOWE: It's true. But again,
5 Justice Ginsburg, you don't look at why the country
6 attributed those particular rights. You just look at
7 whether the parent has those rights.

8 And I think it's helpful to think of the
9 Chilean system, in effect, as a -- as a form of joint
10 custody, just as some countries have a presumption of
11 what we would regard as joint custody.

12 JUSTICE STEVENS: Does your argument really
13 boil down to the claim that this was, in effect, joint
14 custody? It seems to me it clearly was not.

15 MS. HOWE: We believe that the Chilean
16 system is analogous to joint custody.

17 JUSTICE STEVENS: It's not -- no. But --
18 but are you arguing that this case is -- is the
19 equivalent of a joint custody case?

20 MS. HOWE: No. We are arguing that the
21 ne exeat right is a right of custody under the text of
22 the convention. If the Court has --

23 JUSTICE KENNEDY: Well, you are saying -- I
24 know the white light's on -- but you are saying that
25 every case that involves the Chilean government, the

1 convention here is applicable requiring return?

2 MS. HOWE: If the parent has visitation
3 rights, then yes. That's simply the way that Chile has
4 opted to do it.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Ms. Anders.

7 ORAL ARGUMENT OF GINGER ANDERS

8 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING PETITIONER

10 MS. ANDERS: Mr. Chief Justice, and may it
11 please the Court:

12 The ne exeat provision at issue in this case
13 gave Petitioner the power to prevent exactly the harm
14 that is the Hague Convention's central concern.

15 JUSTICE KENNEDY: Do you -- do you agree
16 that every case originating in Chile must come out this
17 way, so that there is a return required?

18 MS. ANDERS: I agree that Chile has by law
19 decided that the ne exeat right should arise
20 automatically in any parent who has visitation rights.

21 JUSTICE KENNEDY: But that seems to me
22 remote from the concept of custody that the convention
23 has in mind.

24 MS. ANDERS: I don't think so, Justice
25 Kennedy. I think the convention's -- the explanatory

1 report makes clear that the convention is designed to
2 protect all of the ways in which joint custody can arise
3 and be awarded under domestic law. And I think we have
4 a variety of situations in every country in which joint
5 custodial rights arise automatically.

6 For instance, in the United States, when two
7 parents are married and separated and there has been no
8 custody order yet, we would say that both of those
9 parents have automatic joint custody rights on the
10 child. In civil law countries, there are a variety of
11 automatic joint custodial decision-making --

12 JUSTICE STEVENS: But is there a distinction
13 between the -- what is before us in this case and the
14 different case in which the order specifically said
15 custody shall be joint? The same -- would that not be a
16 different case, in your view?

17 MS. ANDERS: It would not be a different
18 case, because the convention protects rights of custody
19 and it specifies that those rights can be awarded
20 jointly.

21 JUSTICE STEVENS: The decree says that
22 custody -- the mother is the one who has custody.

23 MS. ANDERS: The mother may have most of the
24 custodial rights, what we would think of as physical
25 custody, but the convention protects rights of custody.

1 And I think what is particularly important is that it
2 separates out the right to determine residence as the
3 most important custody right with which it is concerned.

4 JUSTICE BREYER: What I am thinking of --
5 this is -- maybe you can get at what is bothering me. I
6 am perhaps not articulating it very well. But the --
7 where there's any kind of a custody right, I normally
8 think there was a human being called a family law judge
9 who has a very tough job, and he has looked at the
10 situation of these two people here and the child. And
11 he said, at least: Smith and Mrs. Smith, you are each
12 going to have a little bit, at least.

13 Now, but in a situation where he says to
14 Mr. Smith: Nothing; I want to give you nothing -- he
15 thinks this is Frankenstein's monster; he does not want
16 to give him a single thing -- but on your interpretation
17 of this statute, that doesn't matter. Just because
18 Chile has a general law that says you can't take anybody
19 out of the country without permission, just because of
20 that, even Frankenstein's monster is considered to have
21 custody for the purposes of this, though the human being
22 who looked at this called the family law judge said:
23 Don't let him near that child. All right?

24 Now, that's -- now, don't pick up on my
25 errors in that. I know I haven't stated it quite right,

1 but look at what I'm driving at. And that's what's
2 bothering me.

3 MS. ANDERS: Well, I think Chile could have
4 made a determination as a matter of its domestic law,
5 that it would be in --

6 JUSTICE BREYER: I know there are ways out,
7 but why should we include custody to be a situation
8 where the human being who looked at this couple thought
9 that that individual, the husband, should have nothing
10 but visit him occasionally on Christmas? Why should we
11 interpret the word "custody" in this treaty to include
12 even that situation, which turns the treaty into a
13 general: Return the child, no matter what?

14 MS. ANDERS: Well, I think the convention's
15 fundamental principles actually are in line with your
16 concerns, because what the convention says is that
17 anytime that the child has been abducted in violation of
18 a decision-making right that the -- that one or the
19 other parent has, then the child should be returned.

20 But the return remedy is not a determination
21 that the child should live with the left-behind parent
22 or that he should live out the rest of his life in
23 Chile. It's simply a determination that the courts of
24 the country of habitual residence should decide what
25 should happen with the child going forward. That's the

1 fundamental --

2 JUSTICE SOTOMAYOR: Ms. Anders, that's the
3 point, isn't it? The purpose of the convention is which
4 court will decide the life of that child, correct?

5 MS. ANDERS: That's exactly right.

6 JUSTICE SOTOMAYOR: And to avoid, as I
7 understood the convention structure, this flight from
8 court to court and this long, drawn-out process from
9 country to country over who's going to make that choice,
10 correct?

11 MS. ANDERS: That's right.

12 JUSTICE SOTOMAYOR: And so the idea is,
13 whether it's one custody right -- correct me if I am
14 wrong -- whether it's one custody right or many, which
15 court is going to decide what's in the best interest of
16 that child?

17 MS. ANDERS: That's exactly right, and I
18 think the ne exeat right is very --

19 CHIEF JUSTICE ROBERTS: So that if you have
20 the mother taking her daughter from, say, a country
21 where she would be forced to be raised under sharia law
22 and that -- that is up to that country to decide whether
23 the child has to be returned? Or is there a basis for
24 domestic tribunal in the court, in the -- what is it
25 called, the country of refuge? Can that country decide

1 that the child should not be returned?

2 MS. ANDERS: There are narrow defenses to
3 return, and one of those is the grave risk defense in
4 article 13(b). There is also a fundamental principle
5 defense in article 20. But fundamentally, I think the
6 convention is premised on the idea that the courts of
7 the various states parties will be well-placed to
8 determine the custody --

9 CHIEF JUSTICE ROBERTS: So it's your
10 position that in that case the mother should return her
11 daughter to the country where she will be raised under a
12 system that the mother finds quite offensive?

13 MS. ANDERS: Well, that would not
14 necessarily be the case. Presumably, that mother could
15 raise the 13(b) defense or the article 20 defense to
16 return.

17 CHIEF JUSTICE ROBERTS: And what -- I know
18 Ms. Howe cited it. What is the standard on the 13(b)
19 defense?

20 MS. ANDERS: It says, "A grave risk that the
21 return would expose the child to physical or
22 psychological harm."

23 CHIEF JUSTICE ROBERTS: Does -- does the
24 status of in this case women in the country, does that
25 constitute grave risk or is it an individualized

1 determination?

2 MS. ANDERS: I think it would generally be
3 an individualized determination. But I think the
4 convention is based on the assumption that wherever --
5 wherever the parent started out, wherever their custody
6 determinations are being made to begin with, that is the
7 country that should continue in the normal situation
8 to determine what should be --

9 CHIEF JUSTICE ROBERTS: And that country is
10 going to make a determination in favor of their domestic
11 law and their domestic system. Presumably, they are not
12 going to say: We don't think it's a grave risk to the
13 child to be raised under our system.

14 MS. ANDERS: Well, it would be the -- it
15 would be the courts in the country of residence that
16 would be making that determination. But I think the
17 question of which court might have a more favorable
18 determination, that -- that kind of forum-shopping is
19 precisely what the convention was trying to prevent.

20 JUSTICE BREYER: Well, could we interpret
21 the words "great psychological harm" to include, for
22 example, a situation where an educated woman with an
23 advanced degree is unable to get work in the country
24 where her child lives and has to live under conditions
25 that are really -- we would say are fairly primitive

1 because of her inability to find an appropriate
2 employment? Can you include that under great
3 psychological harm, so the child wouldn't have to go
4 back?

5 MS. ANDERS: Well, I -- I presume that you
6 could, in an individual case, offer evidence that might
7 include things like --

8 JUSTICE BREYER: Well, has there ever been
9 -- would you advocate that kind of very broad standard
10 of great psychological -- what would be your position,
11 or what's the government's position on that?

12 MS. ANDERS: It is that the defense would be
13 more narrow than that. But that's because, first, the
14 convention is based on the idea that -- that the courts
15 of the country of habitual residence can make this
16 determination in the child's best interest, and that
17 they should be the ones to do that, we shouldn't allow
18 forum shopping; and also because the return remedy is
19 not a determination that the child will have to stay in
20 the country for the rest of its life or even that the
21 mother would necessarily have to return with him.

22 JUSTICE SCALIA: There has to be
23 psychological harm to the child; is that right?

24 MS. ANDERS: That's correct.

25 JUSTICE SCALIA: So psychological harm to

1 the woman who can't work in the country would be
2 irrelevant.

3 MS. ANDERS: Well, it might be relevant --

4 JUSTICE SCALIA: -- unless that would
5 secondarily affect the child?

6 MS. ANDERS: Right. Right.

7 JUSTICE SOTOMAYOR: Counsel, you said in
8 your brief that this position by the Solicitor General
9 is longstanding, quoting. What do we look to to see how
10 far back and under how many administrations this
11 position has been taken and in what form?

12 MS. ANDERS: Well, it is certainly the
13 position as memorialized in our brief here. I don't
14 believe that we have memorialized it in writing prior to
15 this brief, but this Court has in the past looked to the
16 government's position as memorialized in an amicus brief
17 in this Court.

18 JUSTICE SOTOMAYOR: But we have been a part
19 of the special commission since 1989, correct?

20 MS. ANDERS: That's correct. And in the
21 first special commission meeting in 1989 and then again
22 in 1993 this issue was on the agenda and the United
23 States joined the consensus of the States parties that a
24 ne exeat right should be considered a custody right
25 under the convention. And so --

1 JUSTICE SOTOMAYOR: Is there anything in the
2 history of the negotiation and passage of the -- of the
3 treaty that -- that reflects what the U.S.'s position
4 was on this particular issue?

5 MS. ANDERS: Not on this particular issue
6 specifically, but this has been our position as -- as
7 expressed in the special commission meetings and reports
8 to --

9 JUSTICE GINSBURG: You don't question what
10 the representatives of the mother have said in this
11 case, that the emphasis -- when this Hague Convention
12 was before Congress, the emphasis was on the custodial
13 parent, that is, the person in the situation of the
14 mother here; that what Congress was told was the urgent
15 problem was the noncustodial parent taking the child
16 away from the custodial parent. That was the -- the
17 major thing that drove this convention and that's what
18 the State Department told Congress; isn't that so?

19 MS. ANDERS: I believe the State
20 Department's legal analysis stated that the typical case
21 might be one in which a parent with -- with primary
22 physical custody had the child, but the visiting -- the
23 parent with visitation rights took the child to another
24 country. But the fact that it was a typical case means
25 that it wasn't the only type of case, and as -- as

1 family law has developed over the past 30 years, joint
2 rights of custody have become more and more prevalent,
3 and we, therefore, think that this is a joint right to
4 determine residence under the convention, because it
5 gives the father the right to withhold or grants consent
6 to the child's removal from the country.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Hays.

9 ORAL ARGUMENT OF KARL E. HAYS
10 ON BEHALF OF THE RESPONDENT

11 MR. HAYS: Mr. Chief Justice, and may it
12 please the Court:

13 Rights of custody and rights of access are
14 very different and distinct substantive rights. The
15 Hague Convention makes a distinction between those two
16 sets of rights and provides the automatic return remedy
17 only in those situations where there has been a breach
18 of a right of custody.

19 What Mr. Abbott is seeking in this case is
20 to have the Court define a bright-line rule, saying that
21 in any instance where there is a statute or a provision
22 which limits the rights of the custodial parent to
23 remove a child outside of -- of the particular
24 jurisdiction, that any time there is a statute or
25 ordinance or order to that effect, that you confer

1 rights of custody upon an individual who would otherwise
2 only have rights of access.

3 JUSTICE GINSBURG: Well, you could say --
4 you can say that the mother did not have full custodial
5 rights. One custodial right is certainly to determine
6 where the child will live. And the mother did not have
7 that right with respect to taking the child out of the
8 country.

9 MR. HAYS: The mother did not have the right
10 to take the child out of the country without either
11 obtaining the permission of the father or obtaining
12 permission of the court to do that. That was a
13 limitation on her exercise of custodial rights. It did
14 not, in and of itself, grant a right to the father. The
15 father was not granted a custodial --

16 JUSTICE KENNEDY: Well, you could say that
17 the limitation on the custodial right is the right of
18 the husband to visit once a month or three -- three
19 weeks a month. I -- I -- I think that's slightly an --
20 an artificial approach.

21 JUSTICE GINSBURG: It's a provision --

22 JUSTICE SOTOMAYOR: Let's assume there is a
23 law that says joint custody. Mom can determine the
24 place to live, mom can determine the education of the
25 child, dad can visit when he wants, dad can review

1 choices but not lead them, but we consider this joint
2 custody.

3 Under your view what defines custody under
4 the convention in a way that would justify an American
5 court saying, that's not a custodial right; even though
6 the law of that domestic jurisdiction defines that and
7 says, that's our terms of joint custody, but we create
8 this kind of joint custody?

9 MR. HAYS: In -- in that situation, the --
10 the rights are created under the law of the
11 jurisdiction, and that -- and that -- in that instance,
12 it would be a joint custodial right.

13 JUSTICE SOTOMAYOR: Right. Regardless of
14 what the terms of that right are, so long as the
15 domestic law deems it such; correct?

16 MR. HAYS: Correct. But in this instance
17 the Chilean courts have not created a joint custodial
18 rights within the common --

19 JUSTICE SOTOMAYOR: Well, except the -- the
20 convention doesn't define custodial rights; correct? It
21 doesn't give them meaning except in one way, the right
22 to determine a place of residence; correct?

23 MR. HAYS: No, Your Honor. What happens is
24 the -- the convention contains an understanding of what
25 the parties at the time of the drafting of the

1 convention understood custodial rights to entail. The
2 focus of the convention was on maintaining the
3 relationship between the parent that was providing care.
4 And, so, the members of the convention --

5 JUSTICE SOTOMAYOR: That's a little tough,
6 because parents provide care in so different many ways.
7 And weren't the convention members very cognizant of the
8 fact that in different countries that has different
9 meanings?

10 MR. HAYS: They were. But they understood
11 that there was a commonly accepted understanding of
12 custody in terms of the party who had care for the
13 child. And that was --

14 JUSTICE SOTOMAYOR: That's not the word they
15 used. They used "custody rights including determining
16 the place of residence." So they didn't give any
17 greater meaning to the word "care" than that.

18 MR. HAYS: The -- the exact definition from
19 article 5 is rights of custody shall include, rights
20 relating to the care of the person of the child, and
21 then they said, and in particular, the right to
22 determine the child's place of residence.

23 JUSTICE ALITO: Well, suppose there is a
24 court order that prohibits the -- one of the parents --
25 the parent with whom the child lives most of the time

1 from moving more than an hour's drive from the prior
2 place of residence, would that be -- would -- would
3 the -- the other parent then have custody?

4 MR. HAYS: No. Here again, that is -- that
5 is simply a restriction placed upon that parent's right
6 to exercise custody. It is --

7 JUSTICE ALITO: Suppose the court order says
8 that the -- that the child may not move from the house
9 where the child lives now, would that be custody?

10 MR. HAYS: Again, that is -- that is simply
11 a restriction on that parent's right to exercise
12 their -- their --their custodial authority.

13 JUSTICE ALITO: What is the meaning of the
14 phrase "determine place of residence"?

15 MR. HAYS: Determine place of residence
16 was -- was placed into the convention because that
17 ordinarily is a right of custody. A parent who
18 ordinarily has the care of the child has the child with
19 them.

20 And I would hazard a guess that if you were
21 to ask anyone in this courtroom what their residence
22 was, they would tell you that their residence is 123
23 Maple Street. That it doesn't entail the determination
24 of the actual country --

25 JUSTICE ALITO: Well, okay. So, if there is

1 a court order that says the child shall not move from
2 123 Maple Street without the consent of both parents, do
3 both parents then have custody?

4 MR. HAYS: In -- in that case there may be
5 a -- a joint right regarding the -- the -- the
6 determination of the residence, which is not what we
7 have in -- which is not what we have in this case. But
8 here again, it is -- it is more in keeping with simply
9 putting a restriction upon the parents who -- the parent
10 who has the right of custody, their right to exercise
11 that.

12 JUSTICE GINSBURG: If he has the right to
13 say no, don't take the child out of the country, then he
14 has something more than a right of access. You -- you
15 are talking, well, she has the rights of custody. But
16 because he, it's not just the court, because it's his
17 consent in the first instance, he has right to determine
18 that the child shall not live outside the country of
19 habitual residence. That is not a right of access.

20 MR. HAYS: It's important to understand here
21 that -- that he does not have a -- a right under the
22 Chilean statute. It --

23 JUSTICE GINSBURG: I thought the statute
24 says the consent of the -- of the parent.

25 MR. HAYS: The -- the statute says, first of

1 all, that if you -- you have the consent of the parent,
2 but if you don't get the consent of the parent, you go
3 -- you go to the court. So it is --

4 JUSTICE GINSBURG: That is true of custody
5 decrees generally. We get them modified by a court in
6 the best interests of the child. So it -- but in the
7 first instance it says that he has the consent or
8 withholding consent. And my question to you is,
9 whatever that is, it isn't a right of access?

10 MR. HAYS: It's actually not, it -- and that
11 -- and that is the position that Mr. Abbott wants this
12 Court to -- to take; is that, well, it's a right, and
13 since it's not a right of access, it has to be a right
14 of custody.

15 It's -- it's actually not a substantive
16 right. It is a means of doing two things, which is what
17 the United States recognized at the time of the drafting
18 of the convention. It is a means of preserving the
19 jurisdiction of the court. It is also a means of
20 enforcing access rights. It is a procedural right, it
21 is not a substantive right, and the -- the Hague
22 Convention clearly makes a distinction between
23 substantive rights of custody and substantive rights of
24 access. But what -- what the -- Mr. Abbott wants --

25 JUSTICE GINSBURG: It just says that the

1 right of access is the right to take a child for a
2 limited period of time to a place other than the child's
3 habitual residence. There is nothing about procedure or
4 substance in this; it says this is what right to custody
5 is, and this is what right of access is.

6 MR. HAYS: Actually, Your Honor, what the --
7 what the convention does is not specifically define
8 either term. The -- the terminology is -- is it
9 includes these particular rights, because they didn't
10 want to get specific as to what exactly rights of
11 custody entailed, what exactly rights of access
12 entailed.

13 JUSTICE KENNEDY: But that -- that cuts both
14 ways so far as you are concerned, because it includes --
15 might mean that custody includes the right to insist on
16 living in a specific country.

17 MR. HAYS: That was not the understanding of
18 -- of the drafters of the convention, because -- and --

19 JUSTICE KENNEDY: But textually that is
20 certainly plausible.

21 MR. HAYS: Textually, when -- when -- when
22 you examine article -- when you examine article 5 in
23 conjunction with article 3 and article 13, that
24 doesn't -- that doesn't -- that doesn't follow, because
25 article 3 and article 13 both provide that the rights

1 had to be actually exercised. And when you -- you read
2 the Perez-Vera report which is analyzing both of these
3 sections, it -- it is clear that the drafters at the
4 time was that you had to have actual physical care of
5 the child, because the purpose of this -- of this
6 convention was to prevent the situation that this Court
7 has already discussed, and that is, a parent who has
8 custodial rights, full custody of a child, the other
9 parent kidnaps the child and takes them to another
10 country in order to seek a -- another court order.

11 In this case you don't have that situation.
12 Chile already determined that Mrs. Abbott had full
13 custody of her child.

14 JUSTICE STEVENS: May I ask this question
15 about the term place -- place of residence? Putting
16 aside the control of the ne exeat that would prevent her
17 from leaving the country, just looking at the situation
18 within Chile. What -- did she have any limitation on
19 her right to pick that -- place of residence within
20 Chile?

21 MR. HAYS: Absolutely not. She could decide
22 wherever she wanted to live in Chile under the court
23 order that she was given. She had full control over
24 deciding where -- where her son was to live --

25 JUSTICE STEVENS: The only control that the

1 -- the husband had was the right -- whatever right was
2 given by the ne exeat provision, that you can't take the
3 child out of the country.

4 MR. HAYS: That's correct. That she had to
5 first get either his permission or go to court and get
6 permission of the -- of the court.

7 JUSTICE STEVENS: If there had been no fight
8 of the kind that developed, she would have had a
9 unrestricted right to pick the place of residence?

10 MR. HAYS: Absolutely. She -- she had the
11 absolute right to decide all issues with respect to her
12 son.

13 JUSTICE ALITO: Which is more important,
14 determining the house in which the child is going to
15 live or determining the country in which the child is
16 going to live?

17 MR. HAYS: For purposes of the convention,
18 determining the house where -- where the child lives,
19 determining the issues relating to the care of the
20 child, because that is what the convention was trying to
21 protect, that relationship, because you were having
22 situations where parents who had a custodial
23 relationship with the child would have that relationship
24 severed by the other parent taking the child, going to
25 another country and then seeking a court order.

1 And there is one thing that I think needs to
2 be corrected here. When Mrs. Abbott went to Texas, she
3 did not attempt to obtain a court order that would have
4 stripped Mr. Abbott of his rights. In fact, in Texas
5 the presumption is joint managing conservatorship. And
6 she asked for sole managing conservatorship which would
7 have been the equivalent of what she was granted under
8 Chilean law.

9 JUSTICE ALITO: Why would the signatories of
10 this convention have wanted to regard a parent as having
11 custodial rights if the parent has the right to veto a
12 change of address within a country, but not when the
13 parent has the authority to veto the future nationality
14 and cultural background of the child?

15 MR. HAYS: They very well may not have
16 intended either of those instances to create a -- a
17 joint right of -- of -- of custody. At the point in
18 time when the convention was being drafted, joint
19 custodial rights were -- were basically a new concept,
20 and there were -- there was not a lot of experience in
21 the exercise of joint -- of joint custodial rights.

22 The -- the focus of the convention was
23 ensuring that the parent who had the primary
24 relationship with -- with the child, that that
25 relationship would not be severed by someone taking a

1 child out of -- of the country. And that was the focus
2 of -- of the convention, which is why there was a
3 distinct difference drawn between protecting rights of
4 access and protecting rights of -- rights of custody.

5 Rights of access were given different
6 protection mechanisms under -- under the convention, as
7 opposed to the mandatory return that was -- that was
8 envisioned by rights -- by --

9 JUSTICE ALITO: Well, I don't want to
10 belabor the point too much, but maybe you could just
11 give me an example of a court order that you believe
12 would give a parent the right to determine place of
13 residence, and therefore, would constitute custody
14 within the meaning of the convention.

15 MR. HAYS: Typically -- typically in -- in
16 Texas, Texas adheres to a position of joint managing
17 conservatorship. The presumption in Texas is that both
18 parents have equal ability to make decisions regarding
19 their child. And so the courts will routinely enter
20 orders to say both parents get to decide education, both
21 parents get to decide medical issues.

22 Even in that instance, though, the court
23 will attribute the right to determine the primary
24 residence of the child to one parent or the other, and
25 will impose a -- a restriction on the exercise of that

1 right. They will impose a geographical restriction and
2 say, you can establish residence only in this county or
3 -- or a contiguous county.

4 That is in the nature, though, of a -- of a
5 joint managing conservatorship or joint custody
6 situation. What we have in this case, though, is an
7 instance where all of the custodial rights, all of the
8 decisionmaking authority was given solely to the mother.

9 JUSTICE GINSBURG: Not according to the --
10 what is it, the Chilean central authority, you know, the
11 letter that was sent to the Second Circuit, I think in
12 the Duran case? The -- the authority was in Chile that
13 was responsible for the implementation of this Hague
14 Convention said that it regarded that statute to create
15 a custody right for purposes of the Hague Convention.

16 MR. HAYS: Actually, Your Honor, that
17 statement in the briefs is a -- is a misstatement of
18 what happened in the Beaumont case. In
19 Duran v. Beaumont, there are -- there are distinctions
20 that have not been made by -- by Mr. Abbott. Most
21 importantly, there was no court order in that case.

22 And, when there is no court order, under
23 Chilean law, it is a situation where there is joint
24 custody as a matter of law. Secondly, the actual
25 affidavit and the language of the affidavit is quoted in

1 the dissent to that case.

2 The actual affidavit states both parents
3 have the guard and custody of their daughter, and the
4 decisions of major importance must be adopted by both
5 parents. So, clearly, the Chilean authority was
6 referencing in their -- in their affidavits they
7 provided in that case, to the fact that this was a joint
8 custody situation.

9 And they -- they didn't decide it solely on
10 the basis of -- that this ne exeat statute created a
11 right of custody. Also --

12 JUSTICE GINSBURG: I thought there was a
13 sentence in there -- and you can correct me if I'm
14 wrong -- that said that the statute, under Chilean law,
15 amounted to a right of joint custody.

16 MR. HAYS: The wording -- the wording of the
17 sentence, it includes the statute. It's like the
18 statute, comma, the guard and custody, and also
19 decisions of major importance. It's -- it's a number of
20 things. It's not just singled out the way that
21 Mr. Abbott has -- has presented it to the court.

22 They don't make a statement saying, this
23 statute equates to rights of custody. It's a situation
24 where they say, you take all of this together, the fact
25 that they had the guard and custody of their daughter

1 and the decisions of major importance must be adopted by
2 both parents, you take all of that together as the
3 finding of the Chilean authority that, in fact, the
4 parent in that case had joint decisions and had -- had
5 rights of custody that were being breached.

6 JUSTICE BREYER: So if I -- if I think, as
7 Justice Alito is starting out, that if the -- a court
8 order in the divorce case says the father and mother
9 will jointly decide what house to live in, that the
10 father has a custody right.

11 If it jointly says the father and the mother
12 will decide what State to live in, that that's a custody
13 right; that it says that the father and mother will
14 decide what city, same. The father and mother will
15 jointly what country to live in, same.

16 But suppose that there is no such decree;
17 rather the jurisdictional statutes of the nation,
18 without considering this family, have a rule that says,
19 they have to live in Chile without permission.

20 Is there any way I can draw a line, in terms
21 of this statute, between the two situations, the one
22 being where the divorce judge actually focused on the
23 needs and circumstances of a family, the other being
24 where there was no more than a jurisdictional law in a
25 nation that tried to protect the jurisdiction of its

1 courts?

2 MR. HAYS: The purpose of the convention
3 was -- was not focused on protecting the -- the
4 jurisdiction of --

5 JUSTICE BREYER: I understand that, but what
6 I'm wondering is -- if -- I thought you would agree with
7 me about that, and since I thought you would agree with
8 me about that, you would explain to me how I could reach
9 that result, consistent with the language of this
10 convention, which talks about custody rights granted by
11 operation of law.

12 MR. HAYS: Our position is that this does
13 not give any sort of affirmative right to the father,
14 and it is not a right to determine because, when we take
15 the common usage of the right to determine, it is to
16 make an affirmative decision --

17 JUSTICE SCALIA: Most courts in countries
18 signatory of the treaty have come out the other way and
19 agree that a ne exeat right is a right of custody, and
20 those courts include the U.K., France, Germany, I
21 believe Canada, very few come out the way you -- how
22 many come out your way?

23 MR. HAYS: Actually, Your Honor, the United
24 States and Canada do, and the analysis --

25 JUSTICE SCALIA: Well, wait, I mean --

1 (Laughter.)

2 JUSTICE SCALIA: You're writing our opinion
3 for us, are you?

4 (Laughter.)

5 MR. HAYS: The United States and Canada --
6 as we point out in our brief, and I believe that it's
7 pointed out in other amicus briefs, the -- there have
8 only been seven courts of last resort that have heard
9 this issue. There are some 81 countries that belong --

10 JUSTICE SCALIA: Yes, but, still, in all, I
11 mean, they include some biggies, like the House of
12 Lords, right? And -- and the purpose of a treaty is to
13 have everybody doing the same thing, and -- and I think,
14 we -- if it's a case of some ambiguity, we should try to
15 go along with what seems to be the consensus in -- in
16 other countries that are signatories to the treaty.

17 MR. HAYS: If, in fact, there were a
18 consensus, but there -- there is not a consensus in this
19 instance because we -- as we analyze in our brief and I
20 believe the 11 law professors analyzed in their brief,
21 you cannot get a clear consensus.

22 JUSTICE BREYER: Who's against it? As I
23 read their brief, France is not on their side. It's
24 split.

25 MR. HAYS: Yes.

1 JUSTICE BREYER: Canada is on your side;
2 that the House of Lords is -- has some dicta written by
3 two judges, which is good, but it wasn't a holding in
4 the case.

5 MR. HAYS: Correct.

6 JUSTICE BREYER: And -- and that's about it,
7 and so maybe they --

8 JUSTICE GINSBURG: You have -- you have --

9 JUSTICE SCALIA: Germany.

10 JUSTICE BREYER: Germany.

11 JUSTICE GINSBURG: Elizabeth Butler-Sloss in
12 the Court of Appeals in England, and that was a square
13 holding.

14 MR. HAYS: That was -- there -- there have
15 been -- that is one instance. However, you also have
16 the situation of the -- the Canadian opinions which are
17 well-reasoned opinions --

18 JUSTICE GINSBURG: Which are dicta.

19 MR. HAYS: Which, actually, even though --
20 even though they did not return the child based on
21 the -- on the ground, they still made the -- the
22 decision, and the second case that followed --

23 JUSTICE GINSBURG: All right. Well, you can
24 take the German constitutional court.

25 MR. HAYS: Well, the German constitutional

1 court in that instance, their specific reference in the
2 case itself to the fact that this involved also joint
3 custody rights, as do -- as do a number of the other
4 foreign -- of the other foreign cases. Ireland, also,
5 is one that is cited by Mr. Abbott, and that one
6 involved a situation of joint parental responsibility.

7 JUSTICE BREYER: Who do you count for you of
8 the seven, just so I can write it down and go back and
9 read them? Any one of the seven for you?

10 MR. HAYS: Yes.

11 JUSTICE BREYER: Which?

12 MR. HAYS: The circuit courts in the United
13 States.

14 JUSTICE BREYER: Okay. Any other for you?

15 MR. HAYS: And Canada.

16 JUSTICE BREYER: Canada. Okay. And who's
17 against you?

18 MR. HAYS: The -- well, France is divided.

19 France --

20 JUSTICE BREYER: No. I asked who is against
21 you.

22 MR. HAYS: Against us, it's -- other than --
23 other than the dicta that is -- that is pointed out in
24 the English opinions, we take the position that the
25 other ones, it's unclear as to -- as to how you --

1 JUSTICE BREYER: You think one against you,
2 one for you, the rest unclear?

3 MR. HAYS: Unclear.

4 JUSTICE BREYER: Okay.

5 JUSTICE SCALIA: Is Australia -- is
6 Australia unclear?

7 MR. HAYS: Yes. I -- the -- the Australian
8 case dealt, again, with a -- with a joint custody
9 situation, and in that -- in that particular case, I
10 believe -- if I am correct in my recollection of it --
11 the Australian court expressed some reservation about
12 making a bright-line rule that these type of ne exeat
13 clauses actually established --

14 JUSTICE SCALIA: Well, according to the
15 Petitioner's brief, if this is inaccurate, the
16 Australian court followed the English Court of Appeals
17 decision that Justice Ginsburg referred to, emphasizing
18 the desirability of uniform interpretations of the
19 convention, and I count that against you, the Australia.

20 MR. HAYS: The -- the point that we are
21 making, however, is that, if you have a one or two or
22 even three countries that have gone one way and then you
23 have other countries that have gone the other way, that
24 there's not a clear-cut overwhelming majority of the
25 other jurisdictions that have ruled in favor of

1 establishing ne exeat orders, and --

2 JUSTICE SCALIA: We will have to parse them
3 out, obviously.

4 JUSTICE KENNEDY: I have one question of the
5 counsel and didn't have an opportunity to ask it. If
6 Respondent were return to Chile, would she face criminal
7 charges or contempt charges?

8 MR. HAYS: There -- there is a possibility
9 of -- of that. There is also a possibility under the --
10 there was a question as to -- the -- what -- what
11 remedies could -- could be used. There are -- there
12 are -- under the Hague Convention, article 21 provides
13 remedies for access rights, which is what Mr. Abbott
14 has.

15 Also, as was recognized by the State
16 Department, when they sent their -- when they sent their
17 analysis to the Senate in favor of ratification, the
18 State Department recognized that there are mechanisms
19 within the United States to enforce these orders, namely
20 the Uniform Child Custody Jurisdiction and Enforcement
21 Act that Mr. Abbott could avail himself of.

22 And Mr. Abbott, in fact, did file an action
23 in Texas to enforce his visitation rights.

24 JUSTICE SCALIA: Well, if these things were
25 effective --

1 JUSTICE KENNEDY: But the ne exeat order --

2 JUSTICE SCALIA: -- we wouldn't -- we
3 wouldn't have a treaty, would we?

4 MR. HAYS: If they --

5 JUSTICE SCALIA: If these local remedies
6 were effective, we wouldn't have a treaty.

7 JUSTICE KENNEDY: And I was -- I was going
8 to say the ne exeat order, under your view, is the one
9 order that can't be enforced anyplace.

10 MR. HAYS: Now, the -- the -- a violation of
11 the ne exeat provision could be enforced, but the
12 question before this court is whether the means of
13 enforcing the ne exeat provisions falls under the
14 auspices of the Hague Convention.

15 JUSTICE STEVENS: May I just ask this
16 general question? Is there any danger that the child is
17 old enough to make the decision now and therefore the
18 case is really moot.

19 MR. HAYS: Absolutely. Under Texas law a
20 child that reaches the age of 12, the court is entitled
21 to consider that child's -- that child's desires. And
22 under --

23 JUSTICE STEVENS: So no matter what we do,
24 the child may actually provide the answer to this case?

25 MR. HAYS: That, also, Your Honor.

1 JUSTICE SCALIA: Wait, does that provision
2 of Texas law override the -- the treaty that the United
3 States has entered into?

4 MR. HAYS: The -- one of --

5 JUSTICE SCALIA: Texas can ignore the
6 treaty, because the child is over 12 years old?

7 MR. HAYS: That -- no, it's a specific
8 provision of the treaty, Your Honor. Under article 13,
9 the court -- the court that is deciding whether to
10 return the child has the discretion not to return the
11 child if the child is of sufficient age for the court to
12 take the wishes into account and the child doesn't want
13 to go back.

14 JUSTICE KENNEDY: But that -- but that's a
15 defense to a removal order.

16 MR. HAYS: It -- yes, it is a defense to a
17 removal --

18 JUSTICE BREYER: How old is the child?

19 MR. HAYS: The child is 14 and half right
20 now. And the --

21 JUSTICE SOTOMAYOR: The convention article
22 13 starts at 14, right?

23 MR. HAYS: The -- the convention article
24 does not specify the age. It leaves it up to -- to --
25 to the determination of -- of the particular

1 jurisdiction in which the case is -- is tried. However,
2 because this is in Texas, the -- the Texas statutes
3 provide that you begin to take a child's --

4 JUSTICE SOTOMAYOR: Is Mr. Abbott still in
5 Chile?

6 MR. HAYS: Mr. Abbott's still living in
7 Chile, yes.

8 JUSTICE SOTOMAYOR: And at the time the
9 child was removed, there was ongoing custody motions
10 before the court in Chile?

11 MR. HAYS: Actual, that is incorrect, Your
12 Honor. There was not a custody proceeding in -- in --
13 in Chile at the time. There were three proceedings
14 going on. There was a -- a protective order proceeding,
15 there was a request by Mr. Abbott to increase his
16 visitation rights, his rights of access; and then there
17 was a child support action where my client was
18 attempting to get some \$23,000 in past due child
19 support.

20 Those were the actions that were pending.
21 There was no attempt at that time by Mr. Abbott to
22 change custody. Just as I was saying, there was no
23 attempt by my client to change custody.

24 JUSTICE BREYER: Why didn't your client just
25 ask the judge there to leave Chile?

1 MR. HAYS: Your Honor, I don't know. I
2 don't know.

3 If there is no further questions --

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Howe, you had have four minutes
6 remaining.

7 REBUTTAL ARGUMENT OF AMY HOWE,

8 ON BEHALF OF PETITIONER

9 MS. HOWE: Thank you, Mr. Chief Justice.

10 With regard to the child support, there was
11 an ordinary dispute over the amount of child support
12 that is not addressed in the record, and which was
13 finally resolved and which Mr. Abbott paid.

14 The question of criminal charges, we are not
15 aware on any charges pending in Chile. Mr. Abbott has
16 no intent to bring such charges if Mr. Abbott -- if
17 Mrs. Abbott returns to Chile.

18 And with regard to article 13 and the
19 question about the child's age, article 13 is
20 discretionary rather than mandatory, so all that the
21 court in the United States would be doing would be to
22 send the child back so that the courts there could
23 resolve the dispute.

24 Turning to the -- the issues about the
25 question of determining and the place of residence. As

1 Justice Alito, you alluded, this is an international
2 convention. The convention doesn't care if Mrs. Abbott
3 moved with the child from one address in Chile to
4 another. The convention cares very much when a child is
5 abducted from one country to another.

6 And as regards the definition of residence,
7 it is not defined in article 5(a), but it also appears
8 in article 5(b) which refers to rights of access. It
9 refers to the right to take the child to a place other
10 than the child's habitual residence, and the drafting
11 history on this point makes quite clear that this refers
12 not only to the right to take -- take the child from the
13 home, but the right to take the child out of the
14 country.

15 In the convention context the word
16 "determined" can't have the decisive unilateral meaning
17 that Mrs. Abbott would attribute to it. The convention
18 contemplates that rights will be held jointly and
19 requires parents to work collaboratively. So in this
20 case, the Abbotts, by virtue of the ne exeat right, by
21 -- statute, had a shared, enforceable right to determine
22 whether their child would remain in Chile or would move
23 somewhere else.

24 And despite what Mr. Hays has argued and has
25 argued in his brief, it is a substantive right. The

1 parent who holds the right has the right to ensure that
2 his child remains in his country of habitual residence,
3 which has huge implications with the language and
4 culture in which the child will be raised, and it
5 insures that the courts in Chile can resolve any
6 disputes regarding the child. It is certainly not a
7 mere enforcement mechanism for Mr. Abbott's access
8 rights.

9 With regard to the question of whether or
10 not Mr. Abbott needed to have care and control of the
11 child to invoke rights of custody, article 5(a) of the
12 convention is what defines rights of custody. There is
13 nothing in the text of that statute that requires the
14 person invoking the convention to have physical care of
15 the child.

16 JUSTICE BREYER: Can we read that exception
17 there to say -- "grave injury" and so forth -- can we
18 read it as in essence saying, look, do what's best for
19 the child?

20 MS. HOWE: That -- you could read that as a
21 form of a best interests of the child standard. I
22 believe that we would regard it as a little bit
23 narrower, a grave risk of harm to the child or otherwise
24 place the child in an intolerable situation. But it is
25 a form of the best interest standard, certainly.

1 JUSTICE STEVENS: May I ask you, do you
2 agree with your opponent, putting aside removing the
3 child from the country, that within Chile itself the
4 custodial parent had the full right to determine the
5 place of residence?

6 MS. HOWE: We do agree, yes.

7 CHIEF JUSTICE ROBERTS: I'm sorry, I'm a
8 little taken aback by your answer to Justice Breyer.
9 You think the grave prosecution standard means whatever
10 is the best interest of the child?

11 MS. HOWE: No, I believe it's a stricter
12 standard than simply the best interests of the child.
13 It's the -- you know, it's a -- I believe it speaks for
14 itself. It is a grave risk of psychological harm to the
15 child. The convention --

16 CHIEF JUSTICE ROBERTS: And you agree with
17 what I understood to be the Solicitor General's
18 position, that that is an individual specific and not a
19 culture-specific determination?

20 MS. HOWE: Yes, we do.

21 Article 13 is simply an affirmative defense
22 to the -- once a judge has found that rights of custody
23 exist and have been breached. There is certainly
24 nothing in the history of the convention that reflects
25 any intent by the drafters to narrow the meaning of

1 rights of custody through article 13.

2 And finally, Mr. Hays cannot
3 point to anything other than a single French trial court
4 decision that holds squarely in his favor, and when that
5 trial court decision was raised at the 1993 special
6 commission meeting, it garnered no support from the
7 delegates.

8 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
9 The case is submitted.

10 (Whereupon, at 12:06 p.m., the case in the
11 above-entitled matter was submitted.)

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